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NASA Procedural Requirements

COMPLIANCE IS MANDATORY

NPR 3713.2

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Request Notification of Change

(NASA Only)

Subject: Alternative Dispute Resolution for Discrimination Complaints

Responsible Office: Office of Diversity & Equal Opportunity

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Chapter 2. ADR and Rights Under the Discrimination Complaint Process

2.1 ADR Defined

2.1.1 ADR is any procedure used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombudspersons, or any combination thereof.

2.1.2 At NASA, the most frequently used form of ADR is mediation. Mediation is commonly used for individual disputes but also may be adapted to the needs of multiple participants with a common dispute. Mediation is a process that uses a neutral mediator, who has no decision-making authority (see this NPR, Chapter 4, Sec. 4.3). The mediator facilitates discussions between the parties to a dispute in an effort to reach a mutually acceptable resolution.

2.2 Agency ADR Policy

2.2.1 It is NASA policy to maintain a productive work environment in which disputes can be settled quickly by voluntary use of ADR. Utilization of EEO ADR procedures, when practicable and appropriate, help to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest organizational level. EEO ADR procedures and an increased understanding of the most effective use of such procedures, are intended to enhance the operation of NASA's EEO ADR programs and better serve the workplace.

2.2.2 Consistent with this policy and applicable law, NASA shall:

- a. Ensure that its EEO ADR programs operate to facilitate creative, efficient, and sensible outcomes in EEO disputes; and
- b. Make maximum appropriate use of ADR to avoid EEO workplace disputes, effectively resolve conflicts when they arise, and foster positive and creative ways for NASA's workforce to deal with workplace challenges.

2.3 Notification of Rights Under the Discrimination Complaint Process

2.3.1 Individuals shall be informed of their opportunity to participate in ADR during EEO counseling, which occurs within the informal or precomplaint stage of the process, when ADR is deemed appropriate (see Chapter 3, Sec. 3.1). Consistent with these requirements, the EEO Counselor shall inform individuals of these rights at the precomplaint stage.

2.3.2 ODEO shall inform them of these rights at the formal complaint stage.

2.3.3 EO Directors and ODEO shall also inform individuals that participation in the Agency EEO ADR process shall not in any way diminish their rights to pursue claims under applicable laws and regulations, if ADR is unsuccessful.

2.4 Voluntary Nature of ADR and Prohibition Against Coercion

2.4.1 EO Directors, ADR Managers, and ODEO shall ensure that EEO complainants (referred to as "aggrieved individuals" at the informal stage) and Management representatives knowingly and voluntarily choose to engage in ADR and may choose to withdraw from ADR at any time without prejudicing the outcome of the informal or formal complaint process.

2.4.2 No one, including a neutral, may force or coerce participation or a particular resolution for any party. Complainants also shall be informed that they may not lose their right to pursue claims if ADR does not resolve the matter, providing they continue to meet the regulatory timeframes for pursuing their complaints.

2.5 Effect of ADR Participation on Precomplaint Regulatory Timeframes

2.5.1 Pursuant to regulatory timeframes established under 29 C.F.R. Part 1614:

- a. Within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling, the EEO Counselor shall conduct the final interview with the aggrieved person unless the aggrieved person agrees in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days; and
- b. The aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint (unless the aggrieved person has agreed to an extension of no more than 60 days).

2.5.2 However, where the aggrieved person chooses to participate in ADR, the

precomplaint processing period shall be extended for up to 90 days. If the claim has not been resolved before the 90th day, the notice of the right to file a discrimination complaint shall be issued.

2.6 Management Participation

2.6.1 Management's decision to participate in ADR requires managers to act in good faith to reach a mutually acceptable resolution. However, the participating Management representative shall have the option of discontinuing ADR after consultation with or on behalf of management if the representative determines that no option for resolution acceptable to NASA can be developed.

2.7 Instances Where EEO ADR May be Inappropriate

2.7.1 There are instances in which EEO ADR may not be appropriate or feasible. Accordingly, the EO Director, in consultation with appropriate management officials, shall determine whether a particular case is appropriate for EEO ADR.

2.7.2 Instances in which EEO ADR may be inappropriate include:

- a. An allegation that fraud, waste, or abuse was committed by either party;
- b. A case where a precedential decision is sought;
- c. A case where violence is alleged;
- d. Evidence that one of the parties is acting in bad faith, e.g., when one party mainly seeks delay or appears to be using the process for discovery;
- e. Certain types of harassment, e.g., threatened violence, stalking;
- f. Instances where the complainant has filed multiple complaints in the past in which resolution efforts have been unsuccessful; or
- g. Situations where options are dictated or limited by law. (e.g., reinstating a NASA employee ? a decision to reinstate an employee where the final decision was made by another Agency such as the Office of Personnel Management or the Merit Systems Protection Board.)

2.8 "Class Actions" and Multi-Party Disputes

2.8.1 In instances involving class actions or multi-party disputes and EEO ADR is desired and deemed appropriate, ODEO shall make arrangements for EEO ADR, in collaboration with the Center.

2.9 Confidentiality

2.9.1 The confidentiality of mediation proceedings is required by EEOC and the ADRA of 1996 (with certain limitations discussed in Sec. 2.9.2, below). Confidentiality is critical to parties' trust and their uninhibited, good faith participation in ADR. See also App. B, § B.2, "Agreement to Mediate Form."

2.9.2 Confidentiality is a critical component of ADR. The confidentiality provisions of the ADRA of 1996, as amended, vary depending on such things as the type of ADR

procedure used, the number of parties participating, and the issues involved. ADRA, 5 USC § 574. Generally, the dispute resolution communication, as defined by ADRA, 5 USC § 571(5), or any communication provided in confidence to a neutral shall not be disclosed.

2.9.3 There are exceptions to this rule where disclosure would be permitted or required by law. In order to determine whether information should be disclosed or withheld, NASA officials will seek the advice of the Office of the General Counsel or the Office of the Chief Counsel (if at a NASA Center or component facility) or the Counsel to the Inspector General (if in a matter arising in the Office of the Inspector General) before taking action to release or deny information that may be considered "confidential."

2.10 Representation

2.10.1 EO Directors or ADR Managers shall advise aggrieved individuals that they have the right to be represented during EEO ADR, providing the representative does not present a conflict of interest, but that representation is not required for participation in EEO ADR.³

³ Consistent with EEOC usage, the term "aggrieved" refers to the individual alleging a harm with respect to employment at the informal stage. The "complainant" is used to refer to an individual who has filed a formal EEO complaint. (See also Appendix A, Definitions.)

2.10.2 EO Directors or ADR Managers shall ensure (or require neutrals to ensure) that representatives are informed about EEO ADR and that they understand that in EEO ADR parties are encouraged to participate fully and have the right to speak for themselves.

2.10.3 EO Directors or ADR Managers shall ensure that Management representatives are advised that they have the right to, and should consult with, the Office of the General Counsel or the Office of the Chief Counsel or the Counsel to the Inspector General (if in a matter arising in the Office of the Inspector General).

2.10.4 If an individual is represented by an attorney, the Office of the General Counsel or the Office of the Chief Counsel shall be notified by the EO Director and/or ADR Manager and will decide whether there shall be Agency legal participation in the mediation.

2.11 Reasonable Accommodation During EEO ADR and in Implementation of Settlement Agreements for Disabled Employees

2.11.1 EO Directors and ADR Managers shall ensure that any party to the mediation with a disability who wishes to participate in EEO ADR is provided with a reasonable accommodation if requested. Examples:

- a. A mobility-impaired person may need a mediation room that is wheelchair accessible;
- b. A deaf or hard of hearing person may need a sign language interpreter or assistive device; and
- c. A person taking medication for a psychiatric disability may need drinking water or frequent breaks.⁴

⁴ See also NPR 3713.8A, Provision of Reasonable Accommodation for Individuals with Disabilities; and NPR 3713.1A, Reasonable Accommodations Procedures.

2.11.2 EO Directors or ADR Managers shall ensure that settlement agreements reached in EEO ADR take into consideration and provide for reasonable accommodations as appropriate, consistent with NASA policy and procedures on the provision of reasonable accommodation.

2.12 EEO ADR and Contract Employees

2.12.1 While NASA's EEO complaint process is generally unavailable to nonNASA employees, each Center shall reserve the right, at its discretion, to offer ADR in EEO cases involving non-employees and NASA employees. The EEO ADR Management Team and Office of the Chief Counsel or Office of the General Counsel shall be consulted about the use of EEO ADR under these circumstances.

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